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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

National Association of African-American Owned Media, a California limited liability company; and Entertainment Studios Networks, Inc., a California corporation,

Plaintiffs,

v.

Comcast Corporation, a Pennsylvania corporation; Time Warner Cable Inc., a Delaware corporation; National Association for the Advancement of Colored People, a New York corporation; National Urban League, Inc., a New York corporation; Al Sharpton, an individual; National Action Network, Inc., a New York corporation; Meredith Attwell Baker, an individual; and DOES 1 through 10, inclusive,

Defendants.

CASE NO. 2:15-cv-01239-TJH-MAN

PLAINTIFFS' OPPOSITION TO DEFENDANT TIME WARNER CABLE INC.'S MOTION TO DISMISS COMPLAINT PURSUANT TO RULE 12(B)(6)

[Request for Judicial Notice and Declaration of Mark DeVitre filed concurrently herewith]

Judge: Hon. Terry J. Hatter, Jr.
Date: June 8, 2015
Time: UNDER SUBMISSION
Crtrm.: 17

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STATUTES

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I. INTRODUCTION

This case is about intentional racial discrimination in contracting by two of the country's largest cable companies, Comcast and Time Warner Cable ("TWC"). TWC maligns the Complaint as simply a vehicle for Plaintiff Entertainment Studios Network, Inc.'s ("ESN") "private commercial interests." (TWC Mot. to Dismiss at 1.) But TWC's unlawful refusal to deal with ESN is anything but an ordinary business dispute. TWC engaged in discrimination hand-in-hand with its then-pending merger partner, Comcast Corporation ("Comcast").

In 2014, ESN and TWC were on the cusp of reaching a deal for television carriage when suddenly—and unexpectedly—TWC terminated the negotiations. TWC blamed Comcast for its sudden change of position, stating to ESN that in light of TWC and Comcast's then-pending merger, all carriage decisions had to be approved by Comcast. Despite promising signs from—and advanced negotiations with—TWC, Comcast's interference was the only explanation given to ESN for TWC's refusal to contract with ESN.

By expressly designating Comcast as its agent for carriage, *TWC adopted and implemented Comcast's discriminatory contracting practices*—including Comcast's dual paths for carriage (*i.e.*, the White Process vs. the MOU/Minority Process). Plaintiffs set forth the allegations regarding Comcast's discriminatory contracting practices in the concurrently filed opposition to Comcast, et al.'s motion to dismiss. These allegations are incorporated herein but not restated in full.

TWC claims that the Complaint fails to state a cause of action because Plaintiffs do not allege overtly racist conduct by TWC. But this is not required to plead a discrimination claim. In fact, such explicit racism rarely exists in a discrimination claim. That is why courts, at the summary judgment stage, allow claims to go to a jury when the plaintiff presents evidence that the defendant's purported explanation for refusing to deal with the plaintiff is a pretext; overt evidence of intentional discrimination is not required. Nor must a plaintiff's

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allegations "exclude the possibility that the alternative explanation [posed by the defendant] is true." (TWC Mot. to Dismiss at 6.) Again, that is an impermissibly high burden that Plaintiffs do not even have to satisfy on summary judgment, let alone a motion to dismiss.

In addition, TWC's faulty First Amendment challenge to the Complaint is contrary to Supreme Court precedent. The application of 42 U.S.C. § 1981 to TWC's programming decisions does not require TWC to alter the *expressive content* of its speech. TWC is a cable distributor—a conduit—and its First Amendment rights do not give it license to discriminate on the basis of race. Thus, the First Amendment does not preclude § 1981's application to TWC's carriage decisions.

TWC's attempt to remove Plaintiff National Association of African American–Owned Media ("NAAAOM") from this lawsuit is also flawed. First, TWC claims that Plaintiffs' request for injunctive relief should be dismissed as "improper"—not because Plaintiffs are not legally entitled to such relief, but because the request purportedly lacks "specificity and detail." (TWC Mot. to Dismiss at 10.) There is no legal basis for TWC's argument. Plaintiffs' request for injunctive relief is narrowly tailored to prohibit the discrimination at issue in this lawsuit; and even if it were not, the Court can re-fashion the injunction to comply with Rule 65(d) at a later stage.

Second, TWC contests NAAAOM's standing to pursue injunctive relief. TWC concedes NAAAOM meets the constitutional requirements for standing but argues that NAAAOM should be dismissed for prudential reasons. But organizational plaintiffs, such as NAAAOM, have long been allowed to pursue *injunctive relief* for discrimination claims on behalf of their members—including when those members join the organization as co-plaintiffs in the action.

For these reasons, TWC's motion to dismiss should be denied in its entirety.

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II. FACTUAL BACKGROUND

A. The Television Industry And Comcast's Failed Merger With TWC

Owners and producers of television content generally do not have a means of direct access to television viewers. Rather, content owners and producers, like ESN, are reliant upon television distributors, like Comcast and TWC, to reach consumers. (Compl. ¶ 103.) Television distributors thus "function[], in essence, as a conduit for the speech of others, transmitting it on a continuous and unedited basis to subscribers." *Turner Broad. Sys., Inc. v. FCC* (*Turner I*), 512 U.S. 622, 629 (1994).

Comcast and TWC are therefore in a unique position to block content produced by 100% African American–owned media companies, such as ESN, from reaching their millions of subscribers. *See id.* at 656 (noting that television distributors have "bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home").

In February 2014, Comcast announced plans to acquire TWC for $45 billion. (Compl. ¶ 97.) Following widespread reports that the FCC and U.S. Department of Justice were skeptical of the benefits of the merger and were unlikely to sign off on it, the deal collapsed. On April 24, 2015, "Comcast announced its decision to abandon its $45 billion dollar bid to acquire [TWC]." (Request for Judicial Notice ["RJN"] Ex. A [Statement from FCC Chairman Tom Wheeler on the Comcast-TWC Merger (April 24, 2015)].)

The demise of the merger has no impact on the claims at issue in this action. As alleged in the Complaint and discussed herein, *while the merger was pending*, Comcast and TWC unlawfully discriminated—and coordinated their discrimination—against ESN in contracting for channel carriage and advertising, in violation of § 1981.

B. NAAAOM

National Association of African American–Owned Media ("NAAAOM") was created and is working to obtain for 100% African American–owned media

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companies the same contracting opportunities made available to their white counterparts for distribution, channel carriage, channel positioning, and advertising. (Compl. ¶ 34.) Historically, 100% African American–owned media has been economically excluded from the television industry due to the lack of distribution and advertising support from distributors. (Compl. ¶ 32.) NAAAOM's mission is to remedy this economic exclusion. (Compl. ¶ 34.)

ESN is a member of NAAAOM. (Compl. ¶ 30.) NAAAOM is open for new membership, and other African American–owned media companies have expressed interest in joining NAAAOM to promote its mission. (Declaration of Mark DeVitre in support of Plaintiffs' Opposition to DirecTV's Motion to Dismiss ["DeVitre Decl."] ¶ 3.) Since launching its website, NAAAOM has also received hundreds of registrants for its electronic newsletters. (*Id.* ¶ 4.)

C. ESN

ESN is a 100% African American–owned video programming producer and multi-channel operator/owner, which owns and operates seven original content, high definition television networks. (Compl. ¶¶ 35, 38.) It was founded in 1993 by Byron Allen, an African American media entrepreneur. (Compl. ¶ 36.)

ESN has carriage agreements with more than 40 distributors nationwide, including major distributors such as Verizon, CenturyLink and RCN. (Compl. ¶ 37.) These television distributors make ESN's channels available to a combined 7.5 million subscribers. (Compl. ¶ 37.) ESN's shows have proved popular among viewers of all demographics and have even garnered Emmy award nominations and wins. (*See* Compl. ¶ 38 & Ex. A.)

In December 2012, ESN launched "Justice Central," a 24-hour, high-definition legal and news network featuring several Emmy-nominated and Emmy-award winning legal/court shows. (Comp. ¶ 39.) After just two years, "Justice Central" has already proved itself a successful, high-demand network, boasting triple-digit ratings growth across key television periods. (Compl. ¶¶ 39, 54.)

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D. TWC's Refusal To Contract With ESN For Channel Carriage

Despite substantial efforts, ESN has been unable to secure a carriage agreement with TWC. (Compl. ¶¶ 29, 54, 56-57, 98, 114.) In 2014, ESN held advanced negotiations for channel carriage with TWC executive Melinda Witmer. (Compl. ¶ 57.) Ms. Witmer was presenting ESN's information to TWC President and Chief Operating Officer Robert Marcus. (Compl. ¶ 57.) But before ESN and TWC could finalize and consummate a contract, Comcast put the kibosh on the deal. (*See* Compl. ¶¶ 56-57.)

Following the announcement of the merger, TWC stated that it had delegated channel carriage decision-making to Comcast. (Compl. ¶¶ 29, 56-57, 114.) TWC advised ESN that any channels to be launched on TWC's television platform would need to be approved by Comcast's chief lobbyist and Executive Vice President, David Cohen. (Compl. ¶¶ 26, 56-57.) Comcast programming executive, Jennifer Gaiski, asked ESN—and ESN disclosed—who it was in discussions with at TWC regarding channel carriage. (Compl. ¶ 57.) Soon after, TWC pulled the plug on negotiations with ESN based on instructions from Comcast. (*Id.*)

Pursuant to federal antitrust laws, TWC was legally obligated to make carriage and other contracting decisions on its own behalf. Yet, TWC was unwilling to launch any new channels without express approval of Comcast. (Compl. ¶ 56.) By granting Comcast decision-making authority over its carriage decisions, TWC adopted, ratified and implemented Comcast's discriminatory policies and practices in contracting for channel carriage. (Compl. ¶ 56.)

III. LEGAL STANDARD

In ruling on a motion to dismiss, the Court must accept Plaintiffs' factual allegations as true and view all inferences in the light most favorable to Plaintiffs. *See Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001). To survive a motion to dismiss for failure to state a claim, the complaint's factual allegations must support a "plausible" claim for relief. *Bell Atlantic Corp. v. Twombly*, 550

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U.S. 544, 570 (2007). "[D]etailed factual allegations" are not required. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555).

"The question presented by a motion to dismiss is not whether the plaintiff will prevail in the action, but whether the plaintiff is entitled to offer evidence in support of its claim." *Del Monte Int'l GmbH v. Del Monte Corp.*, 995 F. Supp. 2d 1107, 1113 (C.D. Cal. 2014) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002)). Indeed, "a well-pleaded complaint may proceed even it if strikes a savvy judge that actual proof of those facts would be improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotation marks omitted).

IV. ARGUMENT

A. Section 1981 Broadly Prohibits Race Discrimination In Contracting

Pursuant to § 1981, "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). Section 1981 is derived from section 1 of the Civil Rights Act of 1866, which, in turn, was passed pursuant to Congress' authority to enact legislation to enforce the Thirteenth Amendment. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968).

In passing the Civil Rights Act of 1866, Congress "was moved by a larger objective—that of giving real content to the freedom guaranteed by the Thirteenth Amendment." *Id.* at 433. Congress sought to eradicate "the necessary incidents of slavery," and to secure for all citizens, regardless of race or color, "those fundamental rights which are the essence of civil freedom." *Civil Rights Cases*, 109 U.S. 3, 22 (1883).

To that end, section 1 of the Act was "cast in sweeping terms," *Jones*, 392 U.S. at 422, broadly granting "citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . the same right, in

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every State and Territory in the United States, to make and enforce contracts . . . as is enjoyed by white citizens," Act of April 9, 1866, c.31, s.1, 14 Stat. 27.

Plaintiffs have alleged that TWC has refused to contract with ESN, a 100% African American–owned media company, because of race. Plaintiffs' allegations are sufficient to state a claim under § 1981.

B. The Complaint Alleges Intentional Discrimination By TWC

To state a § 1981 claim, a plaintiff must allege that "(1) the plaintiff is a member of a racial or ethnic minority; (2) the defendant(s) intentionally discriminated against the plaintiff because of race, ethnicity or national origin; and (3) the discrimination concerned one or more activities enumerated in the statute." *Topadzhikyan v. Glendale Police Dep't*, 2010 WL 2740163, at *3 (C.D. Cal. July 8, 2010).

TWC concedes that the Complaint sufficiently alleges ESN is a member of a racial minority and an "unconsummated channel carriage opportunity with TWC." (TWC Mot. to Dismiss at 5.) TWC argues, however, that the Complaint should be dismissed for failure to allege "facts raising even an inference of purposeful racial discrimination by TWC." (*Id.*) TWC is wrong.

As TWC also concedes, a discrimination plaintiff may rely on circumstantial evidence to satisfy the discriminatory intent element. (*Id.*) Here, the circumstantial evidence supports a plausible inference that TWC's decision to delegate carriage decisions to Comcast and to refuse to contract with ESN was based on race.

In 2014, ESN and TWC were engaged in advanced negotiations for a carriage agreement. (Compl. ¶ 57.) ESN provided information to TWC about its programming, including the success of its recently launched "Justice Central," which boasted tremendous ratings growth on TWC's competitors' television platforms. (*See* Compl. ¶¶ 54, 57.) ESN's main contact at TWC, Melinda Witmer, even presented ESN's information to TWC President and Chief Operations Officer, Robert Marcus. (Compl. ¶ 57.) All signs indicated that TWC had evaluated ESN's

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content as qualified to be launched on its cable platform and that the parties would soon be consummating a carriage agreement.

But in May 2014, TWC suddenly backed out on the negotiations. The explanation given to ESN was that TWC would not be launching any new channels unless expressly approved by Comcast. (Compl. ¶ 56.) As alleged in the Complaint and discussed in Plaintiffs' concurrently filed opposition to Comcast's motion to dismiss, Comcast's carriage decisions were—and are—motivated by racial animus. (Compl. ¶¶ 12, 53-54, 75, 79, 88-90.) For example, Comcast stated that it would contract with ESN only if the carriage agreement would satisfy the purported diversity commitments Comcast made in the sham Memorandum of Understanding ("MOU") it entered into with Defendants NAACP, National Urban League, Al Sharpton, and National Action Network. Yet the MOU has not resulted in the launch of *any* networks that are 100% African American–owned or controlled. (Compl. ¶¶ 20-23, 73.)

Comcast's MOU was publicly filed with the FCC and its purported diversity commitments were common knowledge within the television industry. (*See* RJN Ex. B [MOU].) And it is readily apparent that Comcast never lived up to these commitments. Yet, TWC allowed Comcast to exercise authority over TWC's carriage decisions. (Compl. ¶¶ 29, 56-57.) Once Comcast got involved, TWC promptly shut down negotiations with ESN.

TWC's acting per direction from Comcast and its 180-degree change of position give rise to an inference of discriminatory motive. Indeed, "[i]t is well settled law that departures from established practices may evince discriminatory intent." *Nabozny v. Podlesny*, 92 F.3d 446, 455 (7th Cir. 1996) (citing *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977)).

Here, TWC's "established practice[]" was to make its own carriage decisions. But in the face of its pending merger with Comcast, TWC delegated those decisions to Comcast, thus adopting and agreeing with Comcast's racist policies and practices

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in contracting for channel carriage. (Compl. ¶¶ 29, 56-57, 114.) These allegations, taken as true, are sufficient. TWC's motion should be denied.

C. Plaintiffs Need Not Plead An Agency Relationship Between TWC And Comcast

TWC argues that Plaintiffs' § 1981 claim fails because TWC cannot be held liable for Comcast's discriminatory contracting practices without allegations of an agency relationship. (TWC Mot. to Dismiss 7-8.) This argument is a red herring. The Complaint alleges that TWC "adopted and agreed" with Comcast's discriminatory practices by delegating carriage decisions to Comcast and by refusing to contract with ESN at Comcast's direction. (Compl. ¶¶ 29, 56-57, 114; *see also supra* Part IV.B.) In other words, Plaintiffs' § 1981 claim against TWC is based on TWC's *own conduct*—its refusal to contract with ESN.

As TWC recognizes, its delegation of carriage decisions to Comcast while their merger was pending was prohibited by federal antitrust laws. (TWC Mot. to Dismiss 8; *see also* Compl. ¶¶ 29, 56.) That TWC nevertheless did so constitutes evidence of its discriminatory intent. *See, e.g.*, *Nabozny*, 92 F.3d at 455 ("It is well settled law that departures from established practices may evince discriminatory intent." (citing *Village of Arlington Heights*, 429 U.S. at 267)). TWC's "departure[] from [its] established practices" for negotiating carriage (and its potential violation of federal antitrust laws) thus supports Plaintiffs' § 1981 claim, rendering allegations of an agency relationship unnecessary.

Recognizing that TWC's delegation of decision-making to Comcast is sufficient, in and of itself, to subject TWC to § 1981 liability, TWC argues that the Court should disregard these allegations as "vague and conclusory." (TWC Mot. to Dismiss 7.) Not so. As alleged in the Complaint, soon after ESN disclosed that it was having advanced carriage negotiations with TWC to Comcast, a TWC board member told ESN that it would not launch any new channels without Comcast's approval. (Compl. ¶¶ 29, 56-57, 114.) TWC's suggestion that Plaintiffs must allege

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the "who, what, when, where, and how" of this statement impermissibly imposes Rule 9(b)'s heightened pleading standard to Plaintiffs' non-fraud claims. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (applying Rule 9(b) to evaluate "[a]verments of fraud"). Rule 8(a) requires only a "short and plain statement" for Plaintiffs' § 1981 claim. Plaintiffs have satisfied this standard.

Even if Plaintiffs were required to allege an agency relationship (they need not), the Complaint includes allegations sufficient to raise an inference of an agency relationship between TWC and Comcast. "[Q]uestions of agency are evidentiary in nature" and are not properly resolved on a motion to dismiss. *Lindsay v. Yates*, 498 F.3d 434, 442 (6th Cir. 2007) (reversing dismissal of § 1981 claim). Indeed, the two cases cited by TWC—*General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 (1982), and *Morgan v. Safeway Stores, Inc.*, 884 F.2d 1211 (9th Cir. 1989)—were decided after trial and entry of summary judgment, respectively. At this stage, Plaintiffs are not required to prove an agency relationship; they need only allege facts from which an agency relationship may be inferred. *See In re MyFord Touch Consumer Litig.*, 46 F. Supp. 3d 936, 955-56 (N.D. Cal. 2014) (denying motion to dismiss where complaint included allegations sufficient to create reasonable inference of agency relationship).

Here, the Complaint alleges that TWC delegated channel carriage decision-making authority to Comcast—*i.e.*, TWC gave Comcast authority to make carriage decisions on its behalf. (Compl. ¶¶ 29, 56-57, 114.) This allegation is supported by specific factual allegations regarding Defendants' conduct in this case. Comcast asked ESN to identify the executive at TWC with whom ESN was negotiating for carriage. (Compl. ¶ 57.) Immediately after ESN disclosed this to Comcast, ESN's channel launch opportunity with TWC was terminated. (Compl. ¶ 57.) TWC explicitly stated to ESN that any channels to be launched on TWC's television platform needed to be expressly approved by Comcast's David Cohen. (Compl. ¶ 56.) These allegations more than "plausibly" demonstrate the existence of an

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agency relationship between TWC and Comcast.

D. TWC Attempts To Impose Impermissibly High Burdens At The Pleading Stage

Throughout its Motion, TWC advocates a heightened pleading standard for Plaintiffs' § 1981 claim. But § 1981 claims are governed by Rule 8(a)'s liberal pleading standards. *See Swierkiewicz*, 534 U.S. at 513; *Maduka v. Sunrise Hosp.*, 375 F. 3d 909, 912 (9th Cir. 2004) ("*Swierkiewicz* governs complaints in section 1981 discrimination actions."). Although *Swierkiewicz* precedes the Supreme Court's decisions in *Twombly* and *Iqbal*, the Ninth Circuit has repeatedly reaffirmed the applicability of *Swierkiewicz*'s pleading approach since those cases were decided. *E.g.*, *Sheppard v. David Evans & Assocs.*, 694 F.3d 1045, 1050 n.2 (9th Cir. 2012); *United States v. Union Auto Sales, Inc.*, 490 F. App'x 847, 848 (9th Cir. 2012) ("The district court confused the standard for stating a claim of discrimination at the pleading stage and the evidentiary standards that must be met to prove that claim.").

At the pleading stage, a plaintiff need only allege facts "from which a conclusion of discriminatory animus can be plausibly drawn." *Faith Action for Cmty. Equity v. Hawaii*, 2014 WL 1691622, at *11 (D. Haw. Apr. 28, 2014) (noting that the "sensitive inquiry" into evidence of intent "can only occur based on evidence presented after discovery"). As set forth above, Plaintiffs have satisfied this burden.

1. Plaintiffs Need Not Show that TWC Treats Non-African American-Owned Similarly Situated Entities Differently

TWC states that the "Complaint does not allege that TWC treated similarly situated media companies that are not owned by African Americans differently." (TWC Mot. to Dismiss at 6.) TWC misses the mark.

First, the "similarly situated" element derives from the *McDonnell Douglas* burden-shifting framework that is used to evaluate claims of intentional

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discrimination at the *summary judgment stage*—not on a motion to dismiss. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973). Indeed, "[t]he prima facie case under *McDonnell Douglas* . . . is an evidentiary standard, not a pleading requirement." *Swierkiewicz*, 534 U.S. at 510. Plaintiffs are "*not required* to plead a prima facie case of discrimination in order to survive a motion to dismiss." *Sheppard*, 694 F.3d at 1050 n.2; *see also O'Donnell v. U.S. Bancorp Equip. Fin., Inc.*, 2010 WL 2198203, at *3 (N.D. Cal. May 28, 2010) ("[A] prima facie case need not be pleaded in a complaint alleging discrimination." (citing *Twombly*, 550 U.S. at 569-70)).

Second, even at the summary judgment stage, it is "clearly establish[ed] that plaintiffs who allege disparate treatment under statutory anti-discrimination laws need not demonstrate the existence of a similarly situated entity who or which was treated better than the plaintiffs in order to prevail." *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1158 (9th Cir. 2013); *see also id.* at 1159 ("*McDonnell Douglas* simply *permits* a plaintiff to raise an inference of discrimination by identifying a similarly situated entity who was treated more favorably. It is not a straightjacket *requiring* the plaintiff to demonstrate that such similarly situated entities exist."); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004). It would be illogical if, to survive a motion to dismiss, Plaintiffs were required to *plead* an element they need not even *prove* to prevail on summary judgment. *See Swierkiewicz*, 534 U.S. at 511-12.

Indeed, under Ninth Circuit precedent, the similarly situated element may not apply at all in the commercial, non-employment context present here. *Lindsey v. SLT Los Angeles, LLC*, 447 F.3d 1138, 1145 (9th Cir. 2005) (cautioning against applying the similarly situated element in the commercial context because it may be "too rigorous in the context of the denial of services by a commercial establishment, because customers often have no way of establishing what treatment was accorded to other customers"); *see also Swierkiewicz*, 534 U.S. at 512 ("[T]he precise

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requirements of a prima facie case can vary depending on the context . . . ."). Since *Lindsey*, courts have held that plaintiffs need not allege facts regarding similarly situated people in order to state a discrimination claim. *E.g.*, *Lanier v. Clovis Unified Sch. Dist.*, 2010 WL 3733953, at *7 (E.D. Cal. Sept. 20, 2010) ("Where the contract in question is commercial and not employment, courts of this circuit have modified the *McDonnell prima facie* elements by omitting the last element."); *Clemons v. Keller Williams Realty, Inc.*, 2012 WL 994623, at *2 (C.D. Cal. Mar. 23, 2012).

This case exemplifies why the similarly situated element should not apply. TWC's carriage agreements with other content providers—similarly situated or otherwise—are not publicly available. Indeed, in connection with the recent merger proceedings before the FCC, such agreements were treated as "highly confidential"; third parties were not allowed to review them except in connection with the merger proceedings. (RJN Ex. C at 3, 6 [Second Amended Modified Joint Protective Order (Nov. 12, 2014)].) Given the confidentiality of TWC's carriage agreements, requiring Plaintiffs to allege facts as to the similarly situated element to survive a motion to dismiss would ensure TWC could *never* be subject to suit for its discriminatory practices in contracting for television carriage. That is contrary to the "sweeping terms" cast by Congress in enacting—by a two-thirds majority over President Andrew Johnson's veto—the Civil Rights Act of 1866.

2. Plaintiffs Are Not Required to Exclude Alternative Explanations for TWC's Refusal to Contract with ESN

TWC asserts that the Complaint should be dismissed because the "only plausible explanation" for TWC's refusal to contract with ESN is that "TWC made a legitimate business decision in declining to carry ESN's channels." (TWC Mot. to Dismiss at 6.) According to TWC, the Court should, at the pleading stage, evaluate ESN's channels and deem them to have no "novel (or profitable) content." (*Id.* at 6 n.4.) This is not a proper inquiry on a motion to dismiss; it's a question of fact

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reserved for a later stage of the proceedings. *See, e.g.*, *Small v. Feather River Coll.*, 2011 WL 1670236, at *5 (E.D. Cal. May 3, 2011) ("[Defendant's] arguments that Plaintiff was actually the lesser qualified candidate, or that race discrimination was not a factor in hiring, are more appropriate for a summary judgment motion than a motion to dismiss."); *Washington v. Certainteed Gypsum, Inc.*, 2011 WL 3705000, at *7 n.4 (D. Nev. Aug. 24, 2011).

Here, Plaintiffs have alleged that it was in TWC's business interests to enter into a carriage agreement with ESN and that TWC was close to doing so before discriminatory intent intervened. ESN produces Emmy award–winning programming and has carriage agreements for its television channels with more than 40 television distributors nationwide, including major distributors (and competitors of TWC) such as Verizon, Century Link and RCN. (Compl. ¶¶ 37-38 & Ex. A.) These television distributors make ESN's channels available to their combined 7.5 million subscribers. (Compl. ¶ 37.) Additionally, ESN's successful 24-hour legal and news network, "Justice Central," has garnered triple-digit ratings growth between the first quarter of 2013 and the fourth quarter of 2014. (Compl. ¶ 54.) TWC's suggestion that the "only plausible explanation" for its refusal to deal is that it made a business decision not to license ESN's content is contradicted by these factual allegations.

Under the Supreme Court's ruling in *Swierkiewicz*, a complaint states a discrimination claim as long as it gives the defendant "fair notice" of the plaintiff's claims. *Swierkiewicz*, 534 U.S. at 512. Plaintiffs are not required to "*exclude* the possibility of an alternative explanation" for TWC's refusal to contract with ESN. (TWC Mot. to Dismiss at 6 [emphasis added].)

Twombly/Iqbal do not support Defendants' heightened standard. As an initial matter, *Twombly* expressly upheld and reaffirmed *Swierkiewicz*'s liberal pleading standard for discrimination cases. *Twombly*, 550 U.S. at 569-70. Moreover, the Ninth Circuit recognizes that "[t]he level of factual specificity needed to satisfy

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[*Twombly/Iqbal*'s plausibility] pleading requirement will vary depending on the context." *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1107 (9th Cir. 2013). A plaintiff need not, especially in difficult to prove discrimination cases, exclude all possible alternative explanations for the defendant's conduct.

The cases cited by TWC do not suggest otherwise. For example, in *Century Aluminum* (relied on by TWC), the plaintiffs brought a Securities Act claim which required them to allege that they purchased shares that were traceable to a misleading registration statement. 729 F.3d at 1106. In that context, the court was "faced with two possible explanations, *only one of which* [could] be true": Either the shares came from the secondary offering at issue in the complaint or they came from some other pool of previously issued shares. *Id.* at 1108 (emphasis added). In that scenario, the Ninth Circuit required "something more" than allegations that were "merely consistent" with the plaintiff's favored explanation. *Id.* The court indicated that "something more" might include allegations excluding the possibility of the alternative explanation. *Id.* ("Something more is needed, *such as* facts tending to exclude the possibility that the alternative explanation is true." (emphasis added)).

Unlike in *Century Aluminum*—where either the shares were traceable to the misleading registration statement or they were not—there are not two mutually exclusive possibilities here. The Complaint alleges facts supporting Plaintiffs' claim that TWC's decision was motivated by race; TWC disputes this, claiming its decision was an "objective business decision." (TWC Mot. to Dismiss at 6.) This dispute cannot be adjudicated on a motion to dismiss. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (finding that when a court is faced with competing, plausible explanations, a motion to dismiss should be denied).

Moreover, TWC's argument that Plaintiffs must allege facts that would exclude all possible non-discriminatory reasons for TWC's refusal to contract turns the legal standard for pleading and proving discrimination claims on its head. After

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discovery, TWC—not Plaintiffs—will ultimately bear the burden of "produc[ing] evidence of a legitimate non-discriminatory reason" for refusing to contract with ESN. *Lindsey*, 447 F.3d at 1147 (discussing the second step in the *McDonnell Douglas* burden-shifting framework on summary judgment). Despite this, TWC is attempting to place what will be its burden at *summary judgment* on Plaintiffs at the *motion to dismiss* stage. This cart-before-the-horse approach is improper and unworkable. Indeed, the purported, alternative reason relied on by TWC—that it "made an objective business decision"—concerns information about TWC's business practices that is solely within TWC's possession. *See Haley v. TalentWise, Inc.*, 2014 WL 1648480, at *2 (W.D. Wash. Apr. 23, 2014) (denying motion to dismiss where plaintiff "could not plead more factual specificity because she [would] not have further evidence regarding [defendant's] procedures until the parties [began] discovery").

E. The First Amendment Does Not Insulate TWC From Liability

TWC claims that it has free reign to intentionally discriminate against Plaintiffs because the First Amendment protects programming decisions of television distributors. (TWC Mot. to Dismiss 8-10.) This is wrong. TWC's argument rests on a fundamental misunderstanding of the role the First Amendment plays in the cable industry.

A unanimous Supreme Court expressly distinguished the problem of compelled speech in the cable industry from other contexts. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995); *Turner I*, 512 U.S. at 636. *Hurley* recognized that concerns that compelled speech will compromise the "speaker's right to autonomy over [its] message" are "*absent* in the cable context." *Id.* at 576 (emphasis added). That is because there is "little risk that cable viewers would assume that the . . . stations carried on a cable system convey ideas or messages endorsed by the cable operator." *Id.* (quoting *Turner I*, 512 U.S. at 655); *cf. PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (shopping center's

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First Amendment rights not infringed because views expressed by members of the public on shopping center's property are unlikely to be identified with those of the owner).

In other words, unlike the selection of participants for a parade, which is likely to be perceived as showing support for the message conveyed by the participant, television viewers are unlikely to confuse a cable distributor's message with that of the content producer. *See Hurley*, 515 U.S. at 576 ("Unlike the programming offered on various channels by a cable network, the parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience.").

TWC's reliance on a Middle District of Tennessee case in which the court recognized television *producers'* First Amendment right "to control the message and creative content of [its] show[]," is unavailing. (TWC Mot. to Dismiss at 9 [citing *Claybrooks v. Am. Broad. Cos., Inc.*, 898 F. Supp. 2d 986, 999-1000 (M.D. Tenn. 2012)].) TWC is not a content producer; it is a cable distributor—a conduit—transmitting creative content that is produced by others. TWC argues the "same logic and result" that led to the court's dismissal of a discrimination claim against a television *producer* applies to a television *distributor*. (*Id.* at 9-10 .) It does not. TWC's argument is contrary to controlling Supreme Court precedent: *Hurley* unambiguously held that the "same logic and result" does *not* apply to cable distributors. *See Hurley*, 515 U.S. at 575-76.

Hurley likewise distinguished the First Amendment rights of newspaper publishers from those of cable operators. *Hurley*, 515 U.S. at 575 (noting that, unlike a cable operator, a newspaper "is more than a passive receptacle or conduit for news, comment, and advertising" (internal quotation marks omitted)); *see also Turner I*, 512 U.S. at 656 (distinguishing newspaper publishers from cable operators). Thus, TWC's reliance on *McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950 (9th Cir. 2010), discussing the First Amendment rights of a newspaper

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publisher, is equally unavailing.

The First Amendment does not shield TWC from liability for its violations of a content-neutral statute that prohibits discrimination on the basis of race. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (upholding content-neutral "must-carry" regulations under intermediate scrutiny). Here, unlike in *Claybrooks*, § 1981 does not require TWC to alter the expressive content of its speech. Rather, ESN "seeks only to be heard, not to have [its] speech included or possibly confused with another's." *Gathright v. City of Portland, Or.*, 439 F.3d 573, 578 (9th Cir. 2006). TWC's First Amendment argument fails.

F. Plaintiffs' Request for Injunctive Relief Should Not Be Dismissed

TWC argues Plaintiffs' request for injunctive relief is improper in that it "merely restates a statute and asks a party to 'stop discriminating.'" (TWC Mot. to Dismiss 10.) That is false.

The Complaint seeks an injunction "prohibiting Defendants from discriminating against African American–owned media companies on the basis of race in contracting for channel carriage and advertising." (Compl. ¶ 31; *see also* Compl. at 28 [Prayer].) The request for injunctive relief thus seeks an injunction prohibiting Defendants from racially discriminating against a particular, identifiable group—African American–owned media companies—in particular, identifiable aspects of Defendants' business practices—contracts for carriage and advertising.

Moreover, TWC cites to no case law supporting dismissal of a prayer for injunctive relief as too vague on a motion to dismiss. Instead, TWC relies on cases dealing with the propriety of injunctions that have *actually been issued*. (*See* TWC Mot. to Dismiss 10 [citing cases].) Federal Rule of Civil Procedure 65 likewise governs the Court's *issuance* of an injunction, not pleading requirements.

In fact, injunctive relief may be granted even where a plaintiff fails to demand such relief in the complaint. Fed. R. Civ. Proc. 54(c) ("[A non-default] final judgment should grant the relief to which each party is entitled, *even if the party has*

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not demanded that relief in its pleadings." (emphasis added)); *see also Vietnam Veterans of Am. v. C.I.A.*, 288 F.R.D. 192, 202-03 (N.D. Cal. 2012) (allowing claim for injunctive relief that was not asserted in the complaint). It makes no sense to dismiss a request for injunctive relief as too vague when a plaintiff need not even include a demand for such relief at all.

TWC's argument is premature. If and when the Court grants Plaintiffs' request for injunctive relief, it can modify the scope of the injunction, as necessary, to comply with Rule 65(d).

G. NAAAOM Has Standing to Pursue Injunctive Relief

NAAAOM has associational standing to seek injunctive relief under § 1981. An association has standing as the representative of its members so long as

> (1) at least one member has standing, in his own right, to present a claim asserted by the association; (2) the interests sought to be protected are germane to the association's purpose; and (3) neither the claim asserted nor the relief requested requires that the members participate individually in the suit.

N.A.A.C.P. v. Ameriquest Mortg. Co., 635 F. Supp. 2d 1096, 1102 (C.D. Cal. 2009). The first two of these requirements are constitutional; the third is prudential. *See id.*

NAAAOM easily satisfies the three requirements for associational standing. First, TWC does not contest ESN's standing to pursue this action. Second, there can be no dispute that the interests NAAAOM seeks to protect in this lawsuit are germane to its purpose. (*See* Compl. ¶ 34.) Third, NAAAOM seeks only injunctive relief, and thus the individual participation of NAAAOM's members is not required. *See Ameriquest Mortg.*, 635 F. Supp. 2d at 1102-03.

TWC challenges NAAAOM's standing solely on prudential, not constitutional, grounds. TWC cites two cases, both of which deal with organizational plaintiffs that were pursuing claims alongside their member co-plaintiffs under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12151, *et seq.* (*See id.* [citing cases].) But this is not an ADA case. In the ADA context, a special concern arises when an organizational plaintiff seeks to obtain injunctive

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relief to remedy ADA violations that have not injured the member co-plaintiff—*e.g.*, when the organization seeks "relief such as large print menus and braille signs," but the member co-plaintiff has no visual impairment. *Jankey v. Beach Hut*, 2005 WL 5517235, at *7 n.5 (C.D. Cal. Dec. 8, 2005). By contrast, here, NAAAOM's request for injunctive relief is only as broad as necessary to remedy the harm ESN has suffered—namely, to prohibit Defendants from discriminating against 100% African American–owned media companies in contracting for channel carriage and advertising.

Moreover, contrary to TWC's claims, NAAAOM is not merely a "reiteration of ESN." (TWC Mot. to Dismiss 11.) Though ESN is the only 100% African American–owned video programming producer *and multi-channel operator/owner* in the United States, there are indeed 100% African American–owned media companies (that are *not* multi-channel operator/owners) other than ESN. (Compl. ¶¶ 2, 7, 35, 87.) Moreover, NAAAOM is open for new membership and several prospective members have contacted NAAAOM to discuss membership. (*See* DeVitre Decl. ¶ 3.) NAAAOM is a proper party to this lawsuit.

V. IF THE COURT GRANTS TWC'S MOTION, PLAINTIFFS SHOULD BE ALLOWED LEAVE TO AMEND

"Rule 12(b)(6) motions are viewed with disfavor," and dismissal with prejudice should be granted only in "extraordinary" cases. *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). Instead, Rule 15(a)(2) directs a court to "freely give leave" to amend. To the extent Plaintiffs' § 1981 claim is deemed insufficient to state a claim under the liberal pleading standards set forth in Rule 8(a), Plaintiffs respectfully request leave to amend to cure any such deficiency.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny TWC's motion to dismiss the Complaint in its entirety.

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